Supreme Court, U.S.
FILED
MAY 19 1992
OFFICE OF THE CLERK

No. 91-1380

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

SHMUEL DAVID,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITIONER'S REPLY BRIEF

PETER GOLDBERGER
Counsel of Record
PAMELA A. WILK
The Ben Franklin, Suite 400
Chestnut Street at Ninth
Philadelphia, PA 19107
(215) 923-1300
Attorneys for Petitioner

May 1992

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

ARGUMENT IN REPLY: 1

1. Double Punishment. 4

2. Improper Affirmance of Guideline Sentence Imposed on Unlawful Basis. 5

3. Contemporaneous Minimization of Wiretap. 8

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Garrett v. United States, 471 U.S. 773 (1985) 1, 3, 4

United States v. David, 940 F.2d 722 (1st Cir. 1991) 1

Williams v. United States, 503 U.S. --, 112 S.Ct. 1112, 117 L.Ed.2d 341 (March 9, 1992) 6, 7

CONSTITUTION, STATUTES AND RULES

U.S. Const., amend. V, Double Jeopardy Clause 4

18 U.S.C. § 2518(5) 9

PETITION'S REPLY BRIEF

SHMUEL DAVID has petitioned this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered on July 29, 1991, upholding petitioner's convictions and sentences for CCE and substantive drug offenses under the Sentencing Reform Act and prior law. United States v. David, 940 F.2d 722 (1st Cir. 1991); Appx. A. His petition offers three reasons why the writ should be granted:

>(1) The court below misapplied Garrett v. United States, 471 U.S. 773 (1985), to permit cumulative conviction and sentencing where a defendant's Continuing Criminal Enterprise does not continue in time beyond the date of indictment for the CCE's predicate

offenses, and despite subsequent, critical changes in the federal drug and sentencing laws;

>(2) In upholding a firearm enhancement on a basis not relied upon by the prosecutor or the district court, the court of appeals so departed from the accepted course of judicial proceedings as to call for an exercise of this Court's supervisory power; and

>(3) The question whether the exception in Title III, the wiretapping statute, permitting after-the-fact minimization of foreign language conversations where an expert is "not reasonably available" during interception can be satisfied where the government assumes that it must import a police officer from the foreign country, without making any effort to obtain an expert in the United

States, is important and calls for resolution by this Court.

In opposition, the United States contends that the first question is settled by this Court's decision in Garrett; that the district court actually imposed the sentence enhancement on a basis it never stated, or that it so clearly would have that its failure to do so was harmless; and that the third question is routine and fact-bound. None of the government's arguments has merit. The petition should be granted.

To further its position, the Brief in Opposition (hereinafter "BO") restates each of the Questions Presented so as to obscure its significance as a basis for certiorari. A comparison of the Questions as stated by the petitioner with the respondent's counterstatements will show that the respondent has not really

attempted to clarify or correct the questions but rather has crudely sought to conceal from this Court the general significance of each question.

1. Double Punishment. On the first issue, the respondent simply ignores the substance of each point made in the petition. The respondent also pretends that there is no doctrinal connection between the analysis of whether cumulative punishment is allowable for two related offenses and whether those offenses are the "same" so as to bar successive prosecution under the Double Jeopardy Clause. BO 9. This Court's cases, as quoted and applied in the petition (Pet. 32-33) but not even mentioned in the Brief in Opposition, make clear that the respondent is wrong.

Garrett left open the question presented in the petition, and the

continuing viability of that decision is placed in question by subsequent legislation. Accordingly, the writ should be granted to address the first question.

2. Improper Affirmance of Guideline Sentence Imposed on Unlawful Basis. The respondent concedes that the two level gun enhancement under the sentencing guidelines, costing the petitioner an additional six to ten years' imprisonment, could not be justified on the basis given by the district court. Instead, the respondent seeks to defend the disposition below, which justified the enhancement on a different basis, outside the power of a court of appeals. BO 11-12; Appx. A94-95.

The argument made in the petition anticipated this Court's March 9 decision in Williams v. United States, 503 U.S. --,

112 S.Ct. 1112, 117 L.Ed.2d 341 (1992); at the least, this petition should be summarily granted and the case remanded to the court of appeals for reconsideration in light of that decision. Williams allows a court of appeals to find harmless error where a discretionary departure decision is predicated on two bases, one valid and the other improper; it does not permit a court of appeals to construct its own fact-based rationale for the sentencing decision, never articulated by the sentencing judge, and then affirm on that different basis.

And even if Williams ever would allow such a disposition, it is not for this Court, contrary to the respondent's contention (BO 12), to decide in the first instance that the district court's error was "harmless." Williams -- which remanded because this Court could not

determine whether the court of appeals had considered the possibility of harmless error under the proper standard, 117 L.Ed.2d at 357 -- holds directly to the contrary.

Accordingly, this Court should grant the writ on the second question for the reasons stated in the petition -- and to address the rationale of Williams as it pertains to guideline application issues which are not discretionary (like the departure involved in that case) but have factual predicates not ~~made~~ found by the sentencing judge. At the least, this Court should summarily grant the writ and remand for further consideration in light of Williams. At the same time, the Court should direct the court below, in the course of that reconsideration, to entertain the merits of the petitioner's arguments (Pet. at 48-49 nn. 9-11) that

applying the two-point enhancement to the CCE is legally impossible.[1] That point simply cannot have been "waived," as the court of appeals held on rehearing, Appx. A94-95, when no occasion to discuss it had ever arisen in the district court.

3. Contemporaneous Minimization of Wiretap. Petitioner's third point is not a "fact-bound claim" (BO 13) that the efforts made in this case to obtain interpreters to aid in the wiretapping were not reasonable. Here, no effort was made at all. The point is rather that to permit an assumption about the loyalties

---

1. The respondent misrepresents the petitioner's position on this point. BO 12 n.5. Petitioner said he "did not press" the lower court's error in applying the firearm enhancement to the CCE count as a separate ground to grant certiorari. Never have we suggested that the court of appeals' ruling was other than clearly and blatantly erroneous on the merits.

and reliability of the many immediately-available Hebrew speaking interpreters to be upheld as satisfying 18 U.S.C. § 2518(5) so far departs from reason and fundamental principles as to require correction. The writ should be granted on the Title III issue as well.

CONCLUSION

For each of the reasons given in his petition, as amplified above, Shmuel David prays that this Court grant his petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the

First Circuit affirming his convictions and sentences on all but the conspiracy counts of the superseding indictment in this case.

Respectfully submitted,

PETER GOLDBERGER
PAMELA A. WILK
Attorneys for Petitioner

May 18, 1992.